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2 DEPARTMENT OF INDUSTRIAL RELATIONS  
3 STATE OF CALIFORNIA  
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7 DECISION ON ADMINISTRATIVE APPEAL IN RE:  
8 MORRO BAY DESALINATION PLANT  
9 (OPERATIVE PLASTERERS AND CEMENT MASONS' INTERNATIONAL ASSOCIATION  
10 and AQUA DESIGN, INC.; CITY OF MORRO BAY)  
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12 PUBLIC WORKS CASE NO. 91-041A  
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15 INTRODUCTION  
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17 Aqua Design, Inc. (hereafter, "Aqua Design ") appeals the  
18 September 11, 1991, determination of the Director of the Department  
19 of Industrial Relations (hereafter, "Director") which found that the  
20 design, construction and installation of a desalination plant for the  
21 City of Morro Bay (hereafter, "Morro Bay") is a public works within  
22 the meaning of Labor Code section 1720(a).<sup>1</sup>

23 Aqua Design and Morro Bay contend the Director erred by finding  
24 this project to be a public works because: 1) title in the plant  
25 will remain with a private contractor, Aqua Design, during the term  
26 of the contract and until title in the plant is vested in Morro Bay,  
27 a public entity, the project cannot be found to be a public works;

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28 <sup>1</sup> All references herein refer to sections of the California Labor Code, unless  
otherwise noted.

1 2) the risk of loss during the contract remains with the contractor,  
2 which is required to operate and maintain the plant, and not the  
3 public entity; and, 3) under the contract, no public funds have been  
4 or will be paid until certain conditions in the contract are  
5 fulfilled and if those conditions are not fulfilled, no public funds  
6 may ever be spent on the project<sup>2</sup>.

7  
8 Morro Bay also argues the project is not a public works because  
9 there is no authority for finding a contract to be a public works if  
10 it provides conditionally that a structure may be purchased by a city  
11 at a future date long after execution of the contract is complete.

12 The Cement Masons Southern California Work Preservation Trust  
13 (hereafter, "Cement Masons"), on behalf of the Operative Plasterers  
14 and Cement Masons' International Association and others, responds  
15 that the Director correctly found this project to be a public works  
16 because: 1) it is a project constructed for a public purpose on  
17 public land which is being paid for with public funds; 2) the  
18 contract provides that Morro Bay will pay Aqua Design \$3 million upon  
19 completion of construction of the plant and a training period and  
20 will then run the plant itself; 3) the plant is a mere appurtenance  
21 to public land and there is no evidence that the land was ever  
22 devised to Aqua Design; 4) even if Aqua Design has title in the  
23 plant, title in the plant will be passed to Morro Bay upon completion  
24 of the contract; 5) since the ultimate use of the facility will be  
25 public, title in the plant is de minimus to the issue of whether the  
26 project is a public works and 6) the fact that Morro Bay, not Aqua

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27 <sup>2</sup> Morro Bay notes, however, that in all likelihood it will pay a daily water rate as  
28 specified in the contract while Aqua Design operates the plant, regardless of whether it  
ultimately pays for the plant construction.

1 Design, obtained the appropriate Coastal Commission approval for  
2 construction of the plant demonstrates the project is a public, not  
3 private, venture.

4 Aqua Design replies that: 1) only the factors set out in Labor  
5 Code section 1720 are relevant to the determination of whether this  
6 project is a public works; 2) because Aqua Design has received no  
7 payment from Morro Bay to date, the requirements of Labor Code  
8 section 1720 have not been satisfied, therefore precluding any  
9 finding that the project is a public works; and 3) because Morro Bay  
10 failed to include any reference to prevailing wages in the contract,  
11 as required by Labor Code section 1773.2, it did not intend the  
12 project to be a public works and Morro Bay's position should estop  
13 the enforcement of any prevailing wage penalty provisions pursuant to  
14 Waters v. Division of Labor Standards Enforcement (1987) 192 Cal.  
15 App. 3d 635.

16 For the following reasons, the Determination of September 11,  
17 1991, is affirmed and the appeal by Aqua Design is denied.

18  
19 STATEMENT OF FACTS

20 On July 19, 1991, the Cement Masons requested a formal public  
21 works coverage determination pertaining to the construction of a  
22 desalination plant in Morro Bay. The request included several  
23 relevant documents pertaining to the project. (Att.1). Morro Bay  
24 and Aqua Design executed a contract on April 30, 1991, entitled  
25 "Equipment Purchase and Water Supply Agreement." In pertinent part,  
26 the agreement provides the following:  
27  
28

- 1) Aqua Design is required, at its own expense, to "...design, construct, and install a desalination plant in accordance with the terms and conditions of the Agreement." (Section I.)
- 2) Morro Bay must "(P)rovide the Facility Site adjacent to the (Morro Bay) Corporation Yard...", "(P)rovide free access for (Aqua Design) personnel and vehicles to the facility site at all times." and provide Aqua Design "...with evidence of (Aqua Design) rights to use the Site (which is satisfactory to Aqua Design's attorneys)..." (Section I, subsections b.1. and b.7.)
- 3) The contract schedule provides that "(Aqua Design) understands the (Morro Bay) requirements for the plant to be in operation as soon as possible" and that Aqua Design will have the plant "...installed and available for full operation no later than the (97th) calendar day after the date of this Agreement", or credit Morro Bay with a penalty of \$5,000 per day for each day after the 97th day during which the plant fails to produce 400 gallons of potable water per minute after the 97th day. (Section II.)
- 4) During the term of the agreement, Aqua Design "...shall be solely responsible for the operation and maintenance of the plant, including, but not limited to, all spare parts, repairs and operational staff." (Section III)
- 5) The term of the contract is "...nominally two hundred and seventy seven (277) days... divided into a Construction Period and Water Delivery Period". The Construction Period begins "...upon execution of this Agreement and continues until completion of the plant..." The Water Delivery period begins

1 "...upon termination of the Construction Period and will last  
2 for one hundred and eighty (180) days." Completion of the plant  
3 is "...the earlier of: a). the first day of the 3 day  
4 period...(of) production of potable water meeting all applicable  
5 specifications and standards at the rate not less than 400  
6 gallons per minute... or b). (U)pon notice in writing to (Morro  
7 Bay) by (Aqua Design) that the plant is ready for operation...",  
8 made pursuant to conditions stated in the contract if the city  
9 is unable to provide a continuous supply of sea water or is  
10 unable to accept the 400 gallons per minute minimum in its  
11 distribution lines.

12 6) Morro Bay also retains sole discretion to terminate the  
13 services of Aqua Design during the Water Delivery Period,  
14 effective 30 days after written notice, at which time Morro Bay  
15 would assume "...all responsibility for operation and  
16 maintenance immediately upon termination of the Water Delivery  
17 Period." (Section V)

18 7) Morro Bay is required to make all payments one hundred and  
19 eighty days after the end of the Construction Period, which  
20 payments include:

21 a) \$3,098,700.00 as "...full and complete payment for the  
22 plant...";

23 b) a daily rate of \$1725.00, "...representing fixed  
24 operation and maintenance costs incurred during the Water  
25 Delivery Period which do not vary with the water delivery  
26 rate..." to a total amount of \$310,440.00 unless the Water  
27

1 Delivery Period is terminated early pursuant to the contract;  
2 and

3 c) a "water processing rate" in the amount of \$ 3.53 per  
4 one thousand gallons of potable water delivered unless modified  
5 pursuant to the agreement. (Section VI)

6 8) The Agreement requires Aqua Design to invoice all amounts  
7 due not later than 10 days prior to the end of the Water  
8 Delivery Period and Morro Bay is to pay said invoices on the  
9 180th day after the end of the Construction Period. Failure of  
10 Morro Bay to pay on the last day of the Water Delivery Period  
11 would result in assessment and accrual of interest at the rate  
12 of 2% per month on unpaid amounts. (Section VII)

13 9) The contract also includes time is of the essence and force  
14 majeure provisions. (Section IX) 10) During the term of the  
15 Agreement, Aqua Design is "...the sole owner of the plant, free  
16 and clear of any liens or encumbrances of (Morro Bay)".

17 (Section X) However, Aqua Design is required to "...transfer  
18 title to the plant free and clear of any and all liens  
19 encumbrances to (Morro Bay)..." upon payment at the end of the  
20 Construction Period. (Section VI)

21 A lawsuit against Morro Bay and Aqua Design was subsequently  
22 filed by a California corporation in the Superior Court of the County  
23 of San Luis Obispo, alleging various violations of public bidding  
24 procedures and environmental laws.

25 On September 11, 1991, the Director issued a determination  
26 finding construction of the desalination plant to be a public works  
27 pursuant to Labor Code section 1720(a), because the facility was  
28

1 being designed, constructed and installed by Aqua Design under  
2 contract with Morro Bay and was being paid for with public funds.  
3 The determination also stated that while all activities involving on  
4 site construction, installation, connection to Morro Bay's water  
5 distribution system and any plant maintenance, as defined in Labor  
6 Code section 1771 and section 16000 of Title 8 of the California Code  
7 of Regulations, would be subject to prevailing wage requirements,  
8 operation of the plant during the 180 day Water Delivery Period would  
9 not fall within the definition of a "public works" and, therefore,  
10 would not require payment of prevailing wages. (Attachment 2). On  
11 September 16, 1991, Aqua Design filed this appeal. (Attachment 3)..  
12 All parties submitted their written positions on the appeal.  
13 (Attachments 4, 5, 6, and 7).  
14

#### 15 REASONS FOR DECISION

16 Aqua Design first appeals the Determination on the grounds that  
17 title in the desalination plant will be vested in a private, not  
18 public, entity during the term of the contract and until title is  
19 vested in a public entity, the project cannot be a public works.  
20

21 The issue of whether a project in California is a public works  
22 is determined by statute; therefore, the question of title in the  
23 plant is irrelevant. Labor Code section 1720(a) provides:

24 "As used in this chapter, 'public works' means:  
25 (a) Construction, alteration, demolition or repair work  
26 done under contract and paid for in whole or in part out of  
27 public funds, except work done directly by any public  
28 utility company pursuant to order of the Public Utilities  
Commission or other public authority."

1 Here, the contract executed between Aqua Design and Morro Bay  
2 clearly provides for the construction<sup>3</sup> of a desalination plant  
3 capable of producing 400 gallons of potable water per minute.<sup>4</sup>  
4 Morro Bay is required to pay Aqua Design \$ 3,098,700.00 as "full and  
5 complete payment for the plant"<sup>5</sup>, as well a daily "fixed operation  
6 and maintenance" fee during the 180 day Water Delivery period<sup>6</sup>, and a  
7 "water processing rate" of \$3.53 per 1000 gallons of potable water  
8 delivered.<sup>7</sup> Payment to Aqua Design for construction of the plant is  
9 being made directly and only by Morro Bay. On these facts alone, a  
10 prima facie basis for finding that this project falls within the  
11 provisions of Labor Code section 1720(a) has been established.

12 The fact that title in the plant is vested in Aqua Design durin  
13 the construction and water delivery period is irrelevant to the  
14 determination whether the project constitutes a public works under  
15 California law. Construction on private property which is done unde  
16 contract and paid for in whole or part by public funds is a "public  
17 works" requiring payment of prevailing wages and compliance with all  
18 other requirements in Division 2, Part 7, sections 1720 et seq of th  
19 Labor Code. Moreover, both the contract and Aqua Design's proposal  
20 indicate that the property on which the desalination plant is being  
21 built is owned by Morro Bay.<sup>8</sup>

22 Similarly, the fact that the risk of loss during the term of th  
23 Agreement is borne by Aqua Design is irrelevant to the determination  
24

25 3 Agreement, section I.

26 4 Agreement, section V.

27 5 Agreement, section VI a.

28 6 Agreement, section VIb.

7 Agreement, section VIc.

8 See, Agreement, section I.b.1. and I b.7, and Aqua Design proposal "AP 581 Rev. 1  
page 26, section 1.0, paragraph 1.)



1 of whether the project satisfies the statutory conditions of a  
2 "public works". The factors contained in Labor Code section 1720(a),  
3 not the parties' agreement regarding risk during the term of the  
4 agreement, govern the determination of whether the project is a  
5 public works under California law.

6 Aqua Design next contends that the Determination was premature  
7 because no public funds have been or may be paid if the conditions of  
8 the contract are not fulfilled by Aqua Design. This contention  
9 confuses the effect of the parties' terms of contract regarding the  
10 method and timing of payment with the statutory factors governing  
11 whether a project falls within the public works statutes. Where a  
12 duly executed contract between a public entity and a private  
13 contractor clearly specifies, as in the instant case, that public  
14 funds will be paid for construction, determination whether the  
15 project is a "public works" under Labor Code section 1720(a) is not  
16 contingent on prior payment of such public funds.

17 Further, such a rule would work an extreme hardship on public  
18 works contractors in any case in which there was a genuine issue as  
19 to whether a given project constituted a public works. Failure by  
20 such a contractor to maintain certified payroll records and pay  
21 workers prevailing wages would result in the assessment of penalties.

22 Morro Bay raises a similar contention, arguing there is no  
23 authority for finding a contract to be a 'public works' contract when  
24 the contract provides conditionally that a structure may be purchased  
25 by a city at a future date long after the execution of the contract  
26 is complete. This argument is equally erroneous. The contract  
27 clearly provides for payment 180 days after the end of the  
28

1 Construction Period.<sup>9</sup> The Construction Period must end, under the  
2 Agreement, either on the first day of a 3 day period in which Aqua  
3 Design has produced potable water at the rate of 400 gallons per  
4 minute or more, or upon written notice by Morro Bay during the water  
5 delivery period to terminate the services of Aqua Design, or, upon  
6 written notice by Aqua Design, once Morro Bay is unable to deliver a  
7 continuous supply of seawater at 1000 gallons per minute or is unable  
8 to accept the 400 gallon per minute flow of potable water into City  
9 distribution lines.<sup>10</sup> The amount owing is clearly set out in the  
10 Agreement. There is nothing unique about the fact that payment under  
11 this contract is conditioned on specific performance. There is no  
12 basis for assuming performance may not occur by either party as  
13 required under the terms of the agreement. To do otherwise would, at  
14 best, be speculative and violate the parol evidence rule.

15 Finally, Aqua Design contends that failure of Morro Bay to  
16 specify in the Agreement that prevailing wages must be paid indicates  
17 the parties did not intend the project to be a public works and in  
18 any event should estop any penalty enforcement action in this matter.  
19 Statutory factors, not private terms of contract pertaining to the  
20 payment of prevailing wages, determine whether a project constitutes  
21 a public works under California law. Even where the parties agree to  
22 pay prevailing wages, the provisions of Part 7, Division 2 of the  
23 California Labor Code must be satisfied for the project to be found  
24 to be a public works.  
25  
26

27  
28 <sup>9</sup> Agreement, section VIa.

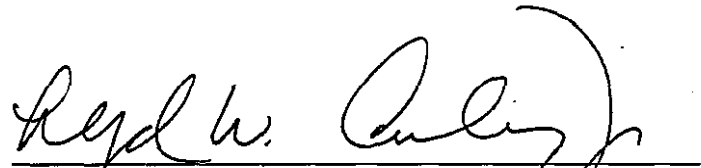
<sup>10</sup> Agreement, section V.

1 With regard to the estoppel argument made by Aqua Design, this  
2 defense to penalties is not relevant to the determination whether the  
3 project constitutes a public works.<sup>11</sup>  
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5 For the foregoing reasons, the appeal of the September 11, 1991,  
6 Determination is denied.

7  
8 DATED:

11/29/91

  
LLOYD W. AUBRY, JR., DIRECTOR  
DEPARTMENT OF INDUSTRIAL RELATIONS

11 The Department notes however that section XVII of the Agreement provides that guidance will be sought by the parties in the Standard Specifications dated January 1988 issued by the State of California, Business and Transportation Agency, Department of Transportation. The Standard Specifications provides that pursuant to Labor Code sections 1720 et seq prevailing wages may be required.